

【특집】

## America the Unfree: How the Politics of Race and Region Built a Prison Nation

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In January 2009, my wife and I took our five-year-old daughter to Washington DC for the presidential inauguration. We went partly to celebrate the passing of a belligerent regime that had made the United States, in the eyes of much of the world, a rogue state, but also to witness, we hoped, a watershed moment in American History.

The big day did not disappoint. The clouds parted as Obama prepared to take the oath of office, and a red-tailed hawk majestically circled the capitol dome. Almost half a century before, Martin Luther King had cried, "Let freedom ring" from the feet of the Great Emancipator. Now Aretha Franklin, in an exuberant church hat, belted out the same refrain from the presidential dais. "The arc of the moral universe," as Dr. King phrased it, seemed to bend at last toward justice.<sup>1)</sup>

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1) Martin Luther King, "Where Do We Go From Here?," August 16, 1967, [http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/where\\_do\\_we\\_go\\_from\\_here\\_delivered\\_at\\_the\\_11th\\_annual\\_sclc\\_convention/](http://mlk-kpp01.stanford.edu/index.php/encyclopedia/documentsentry/where_do_we_go_from_here_delivered_at_the_11th_annual_sclc_convention/). See also Barack Obama, victory speech, November 3, 2008,

I soaked up hope on that icy morning, but as I took in the metropolis of expectant faces that had gathered on The Mall—hallowed soil where a slave market once operated—I was reminded how conflicted was this moment of deliverance.<sup>2)</sup> Some 1.8 million had assembled to celebrate an overdue fulfillment of America's founding promise.<sup>3)</sup> Yet a considerably larger mass—equivalent to adding the population of Boston to the capital throng—spent the same day behind bars.<sup>4)</sup> For America is not only the land of the free, as soldier tenors crooned. By the numbers, it is also the land of the unfree, the most incarcerated society on earth.

Although it is seldom discussed in such terms, imprisonment has become a defining feature of late-modern American exceptionalism. Per capita, the United States locks up 1 out of every 100 adults, a greater share than any other country, with the possible exception of North Korea, which provides no reliable figures.<sup>5)</sup> In aggregate, the

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[http://articles.cnn.com/2008-11-04/politics/obama.transcript\\_1\\_transcript-answer-sasha-and-malia?\\_s=PM:POLITICS](http://articles.cnn.com/2008-11-04/politics/obama.transcript_1_transcript-answer-sasha-and-malia?_s=PM:POLITICS).

- 2) Katherine Q. Seelye, "A Civil Rights Victory Party on the Mall: The National Mall Was Once the Site of a Slave Market Like This One in the 1840s in Washington," *New York Times*, January 17, 2009, <http://www.nytimes.com/2009/01/18/us/politics/18civil.html>.
- 3) Michael E. Ruane and Aaron C. Davis, "D.C.'s Inauguration Head Count: 1.8 Million," *Washington Post*, January 22, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/01/21/AR2009012103884.html>.
- 4) *Prison Count 2010* (Washington, D.C. Pew Center on the States, March 2010); "American Cities with a Population of More than 100,000," *Boston Globe*, [http://www.boston.com/news/nation/articles/2008/07/09/population\\_of\\_us\\_cities\\_2007/](http://www.boston.com/news/nation/articles/2008/07/09/population_of_us_cities_2007/).
- 5) Jennifer Warren, *One in 100: Behind Bars in America 2008* (Washington, D.C.: Pew Center on the States, 2008); Roy Walmsley, *World Prison Population List*, 8<sup>th</sup> edition, (London: International Centre for Prison

U.S. imprisons 2.3 million persons, close to a million more than China, an authoritarian state with four times the population base.<sup>6)</sup> With a collection of some 5,000 jails and prisons scattered across the American landscape, with a national criminal justice budget that exceeds \$200 billion, and with more than 2 million Americans earning their living by restricting the liberty of 7.3 million others, counting those on probation and parole, the United States over the past two generations has assembled the most extensive apparatus of punishment in the history of democratic governance.<sup>7)</sup>

But why?

There explanations are legion: Law and order conservatives have defended the expansion of incarceration as a reasoned and effective response to elevated postwar crime rates, but they fail to explain how other countries, notably Canada, successfully depressed crime rates with no commensurate prison buildup.<sup>8)</sup>

Academic Marxists blame post-Fordist economic restructuring, particularly at the bottom of the labor market from which prisoners hail.<sup>9)</sup> Or

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Studies, King's College, January 2009), 1, 4.

6) Walmsley, *World Prison Population List*, 4.

7) John Gibbons, Nicholas Katzenbach, et al., *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons* (New York: Vera Institute, June 2006), 11; BJS, "Justice Expenditure and Employment Extracts" (2006), <http://www.ojp.usdoj.gov/bjs/eande.htm#selected>; "My Global Career 500," <http://www.myglobalcareer.com/my-global-career-500/>; *One in 31: The Long Reach of American Corrections* (Washington, DC: Pew Center on the States, March 2009), 5. These figures do not include juvenile defendants, immigration detainees, or state and local offenders under types criminal justice supervision other than parole or probation.

8) Franklin E. Zimring, *The Great American Crime Decline* (New York: Oxford University Press, 2007).

9) Christian Parenti, *Lockdown America: Police and Prisons in the Age of*

they point to the emergence of a self-sustaining “prison-industrial complex,” akin to the military-industrial complex.<sup>10)</sup> But here again, political economists have a hard time explaining America’s exceptionally punitive response to the unexceptional forces of corporate globalization and even more difficulty proving that for-profit companies have had a significantly causative effect on criminal justice policymaking across jurisdictions.<sup>11)</sup>

Other analysts claim that what Norbert Elias called “the civilizing process” has reversed course, but they don’t tell us why it did.<sup>12)</sup>

All of these contributors add pieces to the puzzle. But in my view, the literature has failed to fully explain what Jonathan Simon labels “the severity revolution” in criminal justice and social welfare policy, largely because it has failed to contend adequately with history, region, and race.<sup>13)</sup> History because most accounts glance no further

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*Crisis* (New York: Verso, 1999); Ruth Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (Berkeley: University of California Press, 2007).

- 10) Robert Lilly and Paul Knepper, “The Corrections-Commercial Complex,” *Crime and Delinquency* 39, no. 2 (April 1993): 150–166; Joseph T. Hallinan, *Going up the River: Travels in a Prison Nation* (New York: Random House, 2001).
- 11) Arizona’s recent immigration legislation provides a notable exception. Laura Sullivan, “Prison Economics Help Drive Ariz. Immigration Law,” NPR, October 28, 2010, <http://www.npr.org/templates/story/story.php?storyId=130833741>.
- 12) Michael Tonry, *Thinking About Crime: Sense and Sensibility in American Penal Culture* (New York: Oxford University Press, 2004). See also Anne-Marie Cusac, *Cruel and Unusual: The Culture of Punishment in America* (New Haven: Yale University Press, 2009); Sasha Abramsky, *American Furies: Crime, Punishment, and Vengeance in the Age of Mass Imprisonment* (Boston: Beacon Press, 2007); Robert Perkinson, “The Prison Dilemma: Getting Past the Punitive Turn,” *The Nation*, July 6, 2009.
- 13) Jonathan Simon, “Governing through Crime,” in *The Crime Conundrum: Essays on Criminal Justice*, eds. Lawrence M. Friedman and George Fisher

back than the 1960s, such that widescale imprisonment seems to materialize from the ether. Region because almost all scholars ignore the role of the states of the former confederacy, where prison expansion began and where prison growth has been strongest. Race because, surprisingly, although everyone acknowledges race as an important variable, relatively few draw upon the deeply entwined histories of criminal justice and racial subjugation as a way to help make sense of the present.

My research has tried to bring these three factors to the fore:<sup>14)</sup> To expand the frame of historical analysis to encompass the full history of the prison, from genesis to metastasis, from the original era of American unfreedom, slavery, to our own, mass imprisonment. To contend fully with the southern roots of America's uniquely harsh approach to criminal justice, homing in especially on Texas, the most locked-down state in the nation and well-spring of punitive policy innovations from lethal injection to prosecutor empowerment. And to take seriously the fact that measures of racial disparity in criminal justice have worsened in the post civil rights era; that more than fifty years after *Brown v. Board of Education*, black men in the United States are more likely to go to prison than graduate from college.<sup>15)</sup>

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Heretofore, the conventional narrative of prison history has been

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(Boulder: Westview Press, 1997), 39.

14) For a full articulation of these arguments, see Robert Perkinson, *Texas Tough: The Rise of America's Prison Empire* (New York: Metropolitan Books/Henry Holt, 2010).

15) Bruce Western, *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006), 29.

remarkably parochial, centered in the Northeast, with California tossed in for spice. Open almost any book on the subject, and the story begins with the birth of the penitentiary—citadels of the Enlightenment that were supposed to restore wayward citizens to virtue through penitent solitude—and culminates with the development of modern correctional institutions, complete with counseling and parole. The perspectives vary, from credulous progressivism to Foucauldian skepticism, but the plotlines are virtually indistinguishable.

This geographic and thematic narrowness made some sense so long as mainline penologists, whatever their shortcomings, claimed inmate reclamation as their goal, but now that the country's prison establishment has largely abandoned the pretense of rehabilitation, it is easier for us to see that a counter tradition of public vengeance, corporal debasement, and labor exploitation has always been present, if not dominant, and that criminal justice policy innovations have not just flowed from North to South but, increasingly, in reverse.

In the South, disciplinary practices developed not in factories or Quaker meeting houses but on cash-crop plantations staffed by forced labor. Police organizations took hold not to corral the proletarian rabble but to catch and brutalize refractory or runaway slaves. The law promoted not equal citizenship but rigid bifurcations between free and unfree, white and black. By the mid-nineteenth century, most southern states had built penitentiaries, but they were reserved almost exclusively for whites. According to most antebellum penal codes, slaves and free blacks could be punished only on the flesh—with the lash or the noose—and only rarely by the state.<sup>16)</sup>

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16) Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the Nineteenth-Century American South* (New York: Oxford University Press,

The civil war upturned this Manichean social order, but when white supremacists fought their way back to power—through the most sustained and successful terrorist campaign in American history—a two-tiered social structure reemerged: Jim Crow segregation bolstered by Jim Crow justice. Tens of thousands of former slaves lost their freedom, generally for petty crimes (one Texas fellow got two years for swiping a pair of shoes), while KKK murderers went free.<sup>17)</sup> But as white courts produced black felons, the prisoners were not marched to the penitentiary. Instead, southern Democrats turned to a loophole in the Thirteenth Amendment to the Constitution, which prohibited “slavery [and] involuntary servitude, except as punishment for a crime.” Strapped for cash but determined that the state should assume the repressive authority previously exercised by masters, lawmakers began hiring out convicts to the highest bidder—generally, railroads, mining outfits, and planters, who paid little for their charges and less for their upkeep but nonetheless forced prisoners to toil from sun to sun without remuneration.<sup>18)</sup>

The practice, known as convict leasing, filled state coffers and generated tremendous profits for lessees. Prisoner labor helped build the New South, just as slavery built the old, but at tremendous cost: broken families, arrested economic development, shattered lives, and

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1984).

17) District Clerk, Calhoun County, to McRae, December 4, 1867, Records Related to the Penitentiary, box 022–10, folder 8.

18) On convict leasing generally, see Matthew J. Mancini, *One Dies, Get Another: Convict Leasing in the American South, 1866–1928* (Columbia: University of South Carolina Press, 1996); David M. Oshinsky, *“Worse Than Slavery”: Parchman Farm and the Ordeal of Jim Crow Justice* (New York: Free Press, 1996); Alex Lichtenstein, *Twice the Work of Free Labor: The Political Economy of Convict Labor in the New South* (London: Verso, 1996).

at least 30,000 deaths, perhaps ten times the toll of lynching, which developed simultaneously and has received greater attention by scholars.<sup>19)</sup>

After half a century or so, depending on the jurisdiction, convict leasing came to an end, a casualty of Populism and Progressivism. But again, southern states blazed their own trail. Rather than establish northern-style reformatories, state governments simply took over the labor camps of former lessees—mines in some cases, plantations in others—and carried on their operations as before, without the middlemen. In this way, southern penal institutions preserved the lifeways of slavery deep into the twentieth century: gang labor production propelled by the whip instead of wages. Even today, you can pull up to the fence line of a Texas prison farm and observe squads of convicts, almost all of them black, trundle out to the fields, empty cotton sacks over their shoulders, a white overseer, or field boss, following behind on horseback, a 30–30 jostling in his scabbard.

Although white men have similarly driven blacks to work in these same fields for generations (some Texas farms have operated continuously since the 1830s but have never had a crop harvested by free labor), progressives believed that plantation punishment was destined for the junk heap of history. In the late 1960s, civil rights attorneys brought federal conditions-of-confinement suits against most southern penal systems that they hoped would force southern states to embrace the cause of inmate rehabilitation.<sup>20)</sup> In the North, penologists predicted

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19) Perkinson, *Texas Tough: The Rise of America's Prison Empire*, 128. Deaths associated with local peonage dramatically increase the total. See Douglas A. Blackmon, *Slavery by Another Name: The Re-Enslavement of Black People in America from the Civil War to World War II* (New York: Doubleday, 2008).



that counseling and community corrections would gradually replace big houses and that policymakers should start planning, as one book put it, for a “nation without prisons.”<sup>21)</sup>

Instead, the opposite occurred. Between 1970 and 2000, the US prison population sextupled, with southern states accounting for three fifths of the growth.<sup>22)</sup> Imprisonment expenditures increased forty-four fold. So many walled institutions sprang up from coast to coast that prison building has come to define the public works legacy of the late twentieth century, just as hydroelectric dams memorialize the 1930s or interstate highways the 1950s.<sup>23)</sup>

These facilities filled up with convicts of all sorts, but overwhelmingly they caged poor men of color. Since 1968, the white prisoner population has increased eight fold, the black prisoner population fourteen fold, the Mexican American population twenty-five fold.<sup>24)</sup> In per capita terms, the picture is, if anything bleaker. A half century ago, before the Montgomery Bus Boycott, before the War on Poverty, blacks were

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20) Malcolm Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998).

21) Calvert R. Dodge, *A Nation without Prisons: Alternatives to Incarceration* (Lexington, Mass.: Lexington Books, 1975). See also Norval Morris, *The Future of Imprisonment* (Chicago: University of Chicago Press, 1974).

22) Margaret Werner Cahalan, “Historical Corrections Statistics in the United States, 1850–1984,” (Washington, D.C.: Bureau of Justice Statistics, 1986); Michael J. Hindelang, et al., *Sourcebook of Criminal Justice Statistics, 1973* (Washington, D.C.: U.S. Department of Justice, August 1973); Allen J. Beck and Paige M. Harrison, *Prisoners in 2000*, NCJ 188207 (Washington, D.C.: BJS, August 2001).

23) BJS, “Justice Expenditure and Employment Extracts” (2005); Susan B. Carter et al., *Historical Statistics of the United States*, millennial ed., vol. 5 (Cambridge: Cambridge University Press, 2000), pt. E, 5–311.

24) Perkinson, *Texas Tough: The Rise of America's Prison Empire*, 457.

imprisoned at roughly four times the rate of whites. Today, African Americans are imprisoned at seven times the rate of whites, nearly double the level of disparity measured before desegregation. Jim Crow has retreated from the free world but taken up residence behind bars.<sup>25)</sup>

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These statistics are the subject of much hand-wringing among liberal-minded scholars and practitioners, but if one reviews the changing politics of punishment in the North and South in the post civil rights era, they are hardly surprising. Criminal justice is notorious for producing unintended consequences, but the hyper-inflation and racialization of American justice was hardly unpredictable. Two epochal shifts in US politics make this plain.

First, southern conservatives regrouped in the criminal justice arena when they faced defeat on segregation. This recalled the reconstitution of white supremacy in the wake of emancipation, and it gained force in step with the nation's Second Reconstruction. In the 1940s, Dixiecrats warned that integrated war industries would spawn Negro criminal predation, and as southern conservatives yielded to court orders and street protests, they increasingly stressed public

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25) Racial disparity estimates based on: Patrick A. Langan, *Race of Prisoners Admitted to State and Federal Institutions, 1926-1986*, NCJ-125618 (Washington, D.C.: BJS, May 1991); Campbell Gibson and Kay Jung, *Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990*, Working Paper Series No. 56 (Washington, D.C.: U.S. Census Bureau, September 2002), table 1; Allen J. Beck and Paige M. Harrison, *Prisoners in 2000*, NCJ 188207 (Washington, D.C.: BJS, August 2001), 10; Jesse McKinnon, *The Black Population: 2000*, Census 2000 Brief, C2KBR/01-5 (Washington, D.C.: U.S. Census Bureau, August 2001), 3; Elizabeth M. Grieco, *The White Population: 2000*, Census 2000 Brief, C2KBR/01-4 (Washington, D.C.: U.S. Census Bureau, August 2001), 3.

order and law enforcement.<sup>26)</sup> In Texas and other southern states, the same legislative sessions that grudgingly acquiesced to civil rights legislation enacted stern criminal justice statutes that ignited the prison boom. Although the rhetoric was more circumspect—with “law and order” replacing “white supremacy” and even “states’ rights” as a right-wing rallying cry—southern states effectively institutionalized the worldview of Texas’s arch-segregationist senator Joseph Bailey, who once remarked, “I want to treat the negro justly and generously as long as he behaves himself, and when he doesn’t I want to drive him out of this country.”<sup>27)</sup>

Second, the white South reasserted its national political muscle through a historic partisan realignment known as the “southern strategy.” According to opinion polls in the early 1960s, voters perceived little difference between the nation’s two main political parties on race. But as prominent Democrats from FDR forward slowly endorsed civil rights demands, the party of Lincoln, inspired by the party-splitting success of George Wallace, swept in to harvest disaffected white voters, not by spouting out-dated racial epithets but by assailing crime and urban riots, which they conflated with civil rights protests, and promising stronger law enforcement. The strategy failed for Barry Goldwater but it played a critical role in propelling Richard Nixon to the White House, where he launched the war on drugs and diverted law enforcement resources from white collar to

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26) Naomi Murakawa, “The Racial Antecedents to Federal Sentencing Guidelines: How Congress Judged the Judges from Brown to Booker,” *Roger Williams University Law Review: Symposium on Sentencing Rhetoric* 11, no. 2 (2006): 473–494.

27) Bruce A. Glasrud, “Child or Beast?: White Texas’ View of Blacks, 1900–1910,” *East Texas Historical Journal* 15 (1977): 39.

street crime.

In subsequent decades, despite the setback of Watergate, southern states augmented their political clout—returning almost to the dominant position they occupied in the antebellum period—and political campaigns centered on the “law and order” theme, coupled with assaults on the racially redistributionist social welfare state, helped propel two generations of right-wing politicians into office, where, through mandatory minimum sentences, parole curtailments, and prison construction, they built a prison nation.<sup>28)</sup>

The question now, at the dawn of the Obama era, is whether or not America’s punitive counterrevolution—which gained force under Ronald Reagan, who, like Nixon, campaigned against civil rights and dramatically escalated the war on drugs, and under Bush the Elder, who employed the specter of the black furloughed rapist Willie Horton to defeat Michael Dukakis; which achieved unprecedented scale under Bill Clinton, who tried to protect his right flank by signing every draconian crime bill that came across his desk; and reached its zenith under George W. Bush, who, prior to becoming president, was known primarily as an executioner and singularly avid jailer, and who, after 9/11, took southern-style law enforcement to the world—might finally be coming to an end.

There are scattered signs that this might be the case. Racked by the economic crisis, many states are taking a hard look at their bloated correctional bureaucracies. Pending in congress is perhaps the most promising piece of criminal justice legislation to come along since the Johnson administration, the National Criminal Justice

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28) See also Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

Commission Act, which makes prison reduction an explicit goal but which is currently being amended in the Senate in a process that may distort its best features.<sup>29)</sup>

President Obama has signaled support for the bill, which aims to overhaul federal criminal justice policy from top to bottom, and he has hinted at a social democratic approach to illegality that has been out of favor since the Great Society. But with so many balls in the air, it's unclear that his administration will make criminal justice reform a priority. Yet if Obama's new regime is really to overturn the old; if the new president really aspires to complete the work of Lincoln, as his stagecraft suggests; if he hopes, as he pledged in his inaugural address, to carry forth that "great gift of freedom" and deliver it safely to future generations, then he will have to confront the country's prison crisis.<sup>30)</sup> For America cannot write a better chapter of its too-often tragic history with so many of its citizens behind bars.

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29) Perkinson, "The Prison Dilemma."

30) Barack Obama, Inaugural address, January 20, 2009,  
<http://www.nytimes.com/2009/01/20/us/politics/20text-obama.html>.

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## **Abstract**

# **America the Unfree: How the Politics of Race and Region Built a Prison Nation**

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This essay argues that criminal justice is vital to understanding the paradoxical state of American race relations at the start of a new century. Although the election of Barack Obama represents, in one sense, the culmination of the nation's long black freedom struggle and seems to portend the emergence of an age of colorblindness, by some criminal justice measures, the United States is dispensing less equal justice now than at the height of Jim Crow segregation. By investigating the breathtaking expansion of imprisonment in the late twentieth century and by tracing its roots to a white conservative backlash against youth rebellion and racial integration, this essay argues that what sociologists are calling mass imprisonment is rolling back key gains of the civil rights movement and that President Obama will have to address the country's prison crisis if he wants to be a transformational leader.

## **Key Words**

Race, Racism, African American History, The South, Prison, Obama, Criminal Justice, Crime, United States